

Floyd P. Bienstock (006299)
Douglas D. Janicik (021522)
STEPTOE & JOHNSON LLP
201 E. Washington Street, Suite 1600
Phoenix, Arizona 85004-2382
fbienstock@steptoe.com
djanicik@steptoe.com
Telephone: (602) 257-5200
Facsimile: (602) 257-5299

Christopher Carlsen (*Pro Hac Vice*)
CLYDE & CO US LLP – New York, NY
405 Lexington Avenue, 16th Floor
New York, New York 10174
christopher.carlsen@clydeco.us
Telephone: (212) 710-3900
Facsimile: (212) 710-3950

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel Bandres Oto and Elisa Lopez-
Belio, individually, and on behalf of all
eligible beneficiaries of claims arising
from the wrongful death of Marina
Bandres Lopez-Belio, et al.

Plaintiffs,

v.

Airline Training Center Arizona, Inc.,
Defendant.

Case No. 2:16-cv-01027-DJH

DEFENDANT AIRLINE TRAINING
CENTER ARIZONA, INC.'S MOTION
TO DISMISS PURSUANT TO FED. R.
CIV. P. 12(b)(6) OR, ALTERNATIVELY,
FOR SUMMARY JUDGMENT OR, IN
THE FURTHER ALTERNATIVE, TO
DISMISS ON THE GROUNDS OF
FORUM NON CONVENIENS

ORAL ARGUMENT REQUESTED

1 Plaintiffs also improperly mischaracterize the training provided by ATCA. They refer
 2 to ATCA as a "commercial airline training center," as if ATCA taught Lubitz how to fly the
 3 jetliner he crashed, and issued his German commercial pilot's license. ATCA provides an
 4 eighteen week course in the basic skills needed to fly a small plane. The remainder of
 5 Lubitz' extensive multi-year pilot training program was provided by other entities in
 6 Germany. Lubitz did not obtain his commercial pilot's license until three years after he left
 7 ATCA, and he was not in the cockpit of the Germanwings flight because of the training he
 8 received in Arizona. He was there only because he completed a commercial pilot training
 9 program in Germany, learned to fly a commercial jetliner, was issued a commercial pilot's
 10 license by the German Government, and was hired by a German airline. Plaintiffs cannot
 11 establish that ATCA's training proximately caused or allowed Lubitz to commit suicide and
 12 kill their decedents. Moreover, plaintiffs cannot even establish that ATCA owed a legal duty
 13 to them or their decedents.

14 In the alternative, the Complaint should be dismissed under the doctrine of *forum non*
 15 *conveniens* in favor of the courts of Germany. Plaintiffs and their decedents are and were not
 16 U.S. citizens and have no connection to this Court. And, all of the witnesses and evidence
 17 concerning the issues of proximate and superseding cause – crucial elements of ATCA's
 18 defense – are located in Germany and beyond the jurisdiction of this Court. ATCA will
 19 agree to litigate in the German courts, and will produce in Germany at its own cost all
 20 required witnesses and evidence. Moreover, Germanwings, which is subject to German but
 21 not U.S. jurisdiction, has agreed not to contest liability for full compensatory damages for
 22 the claims in connection with the deaths of plaintiffs' decedents.

23 **STATEMENT OF FACTS**

24 On March 24, 2015, during Germanwings Flight No. 4U9525 from Spain to Germany,
 25 Lubitz locked his co-pilot out of the cockpit and flew the plane into a mountain. Complaint,
 26 ¶¶ 4, 5. Lubitz was suffering from a mental disorder, and was taking psychotropic
 27 medication. ATCA's Statement pursuant to LRCiv.56.1, ¶¶ 79-83.

A. Lubitz' Commercial Pilot Training Program

In September 2008, Lubitz entered a commercial pilot training program operated by Lufthansa Flight Training GmbH ("LFT") in Germany. That program lasted approximately 26 months. *Id.* ¶¶ 4-6. LFT had contracted with ATCA to provide LFT's students a portion of their training – how to fly a small plane. The initial phase of Lubitz' training at LFT involved a year of classroom instruction in Germany. *Id.* ¶¶ 7-12. Shortly after Lubitz started training, he experienced depression and interrupted his training for ten months to seek and complete treatment. His physicians opined that his treatment was successful, and that his depression was in "complete remission." *Id.* ¶¶ 13-15. He then finished his initial training at LFT, completed ATCA's four and one-half month course, and returned to Germany to complete the LFT program. *Id.* ¶¶ 8, 10, 16, 17. ATCA had no further contact with Lubitz after he left Arizona in February 2011. *Id.* ¶ 25.

B. ATCA did not Know About Lubitz' History of Depression

Lubitz did not "apply" to ATCA, and no contractual relationship existed between Lubitz and ATCA. Lubitz was a student in the LFT training program, and he received instruction at ATCA because LFT hired ATCA to teach him how to fly a small plane. Accordingly, ATCA did not "select" Lubitz to attend its course. *Id.* ¶ 11, 63.

ATCA did not know about Lubitz' depression. No person or entity ever advised ATCA about Lubitz' medical history, and ATCA did not have access to, or any reason to seek, his private medical records. ATCA likewise did not have access to LFT's training records, and so it did not even know that Lubitz had interrupted his training at LFT. *Id.* ¶¶ 19-21, 32, 43, 60, 61, 62, 65, 66, 82.

C. Lubitz' Depression did not Disqualify Him from Training

Lubitz' history of depression is irrelevant because it did not disqualify him from flight training, or from becoming a commercial pilot. In order to attend ATCA, Lubitz was required by the FAA and the German LBA (and not by ATCA as alleged by plaintiffs) to maintain current and valid medical certificates issued by those entities. The certificates were issued only after a qualified aero-medical examiner determined that Lubitz was medically

1 qualified to undergo training, and to fly aircraft. Plaintiffs concede that both the FAA and
 2 the LBA issued their certificates to Lubitz with full knowledge of his medical history. *Id.*
 3 ¶¶ 26-59, and Complaint, ¶¶ 113-119. The LBA also issued Lubitz' commercial pilot's
 4 license, and allowed him to fly commercial aircraft, with full knowledge of his medical
 5 history. In fact, the LBA re-validated his medical certificate annually for six years before the
 6 crash – and each time with full knowledge of his medical history. *Id.* ¶¶ 46-48.

7 **D. The Notation on Lubitz' German Medical Certificate was Meaningless**

8 The Notation on Lubitz' German medical certificate was meaningless because it did
 9 not in any way indicate to ATCA (or anyone else) that he had a history of depression. It
 10 simply was a generic reference to the fact that he had unspecified underlying medical
 11 condition that needed to be monitored by the AME at each annual renewal of the certificate.
 12 And, the very fact that he had the certificate meant that the AME and the LBA knew about
 13 his history of depression, and determined that it did not disqualify him from training or
 14 flying. *Id.* ¶¶ 36-45.

15 **E. Lubitz Completed his Training at ATCA Without Incident**

16 No evidence exists that Lubitz experienced a recurrence of his mental health issues
 17 while he attended ATCA. No one ever advised ATCA that Lubitz was experiencing any
 18 mental health issues, and he never exhibited any behavior, and never engaged in any
 19 conduct, that in any way suggested to ATCA that he might be suffering from any form of
 20 mental illness. ATCA never questioned Lubitz' mental stability, and never determined or
 21 suspected that that he was not fit to operate an aircraft. Lubitz successfully completed his
 22 training at ATCA without incident. *Id.* ¶¶ 19-24.

23 **F. Lubitz' Activity After he Left ATCA**

24 When Lubitz left ACTA, he did not hold a pilot's license and did not know how to fly
 25 a jetliner. He knew how to fly a small plane. *Id.* ¶ 67. After leaving ATCA, Lubitz
 26 completed the LFT program, passed a final written examination and a "skills test" in which
 27 he demonstrated the skills necessary to operate a multi-crew commercial aircraft, and
 28

1 successfully completed aircraft landing training. He also completed a course of instruction
2 necessary to fly the Airbus 320 Model Aircraft. *Id.* ¶¶ 68-70.

3 Lubitz was hired by Germanwings in December 2013, and the LBA issued his
4 commercial pilot's license on February 11, 2014 – almost three years after he left ATCA. He
5 underwent an additional six months of training provided by Germanwings where he learned
6 how to fly the aircraft operated by Germanwings. In late June 2014, Lubitz was appointed as
7 a First Officer, and thereafter began flying commercial aircraft for Germanwings as a pilot.
8 *Id.* ¶¶ 71-75. The aircraft operated by Germanwings require two pilots. Accordingly, on
9 every flight operated by Lubitz from the time he became a First Officer to the date of the
10 crash, he was accompanied in the cockpit by another, more senior pilot. During the French
11 Government's post-crash investigation¹, the pilots who flew with Lubitz were interviewed
12 and they all reported that he did not display any behavior to indicate that he was
13 experiencing any mental health issues. *Id.* ¶¶ 76-77.

14 **G. The Recurrence of Lubitz' Mental Health Issues**

15 In December 2014, almost four years after he left ATCA, Lubitz began to re-
16 experience mental health problems and was prescribed anti-depressant medication. His
17 condition worsened rapidly. On March 10, 2015, two weeks before the crash, his doctor
18 diagnosed a possible psychosis, and recommended that he undergo psychiatric hospital
19 treatment. Lubitz' mental health problems, and his use of medication, made him unfit to
20 operate aircraft, but his condition was not disclosed to anyone. It was known only to Lubitz
21 and his physicians. No evidence exists that Lubitz experienced a recurrence of any of his
22 mental health issues at any time between the end of his initial treatment in Germany in
23 October 2009, and December 2014. *Id.* ¶¶ 78-82.

24
25
26 ¹ ATCA relies on portions of the French Government's Final Report in this motion. The
27 factual findings in this report are admissible under Fed. R. Evid. 803(8)(A) and (B). *See also*
28 *Lidle v. Cirrus Design Corp.*, 2010 WL 1644958 (S.D.N.Y. Apr. 22, 2010) (discussing the
admissibility of aircraft accident investigation reports prepared by the U.S. National
Transportation Safety Board).

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6)

Dismissal under Fed. R. Civ. P. 12(b)(6) can be based on "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990), *abrogated on other grounds by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, L.Ed.2d 929 (2007).

To avoid dismissal, the Complaint must contain "enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A complaint that presents nothing more than "naked assertions" without "further factual enhancement" will not suffice. *Id.*, at 557. Allegations of material fact normally are assumed to be true. *Cousins v. Lockyear*, 568 F.3d 1063, 1067 (9th Cir. 2009). "However, the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004)(quotations omitted). "Facts subject to judicial notice² may be considered on a motion to dismiss." *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 2011). And, a court "is not required to accept as true allegations contradicted by judicially noticed facts." *Castle v. Eurofresh, Inc.*, 2010 WL 797138, *3 (D. Ariz. Mar. 8, 2010). "[P]leading on information and belief, without more, is insufficient to survive a motion to dismiss for failure to state a claim." *Solis v. City of Fresno*, 2012 WL 868681, at *8 (E.D.Ca. Mar. 13, 2012). *See also Vivendi SA v.*

² Under Federal Rule of Evidence 201, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ATCA maintains that the Court is able to take judicial notice of the documents posted on the FAA's website that are attached as Exhibit "B" to the Declaration of Matthias Kippenberg submitted in support of this motion.

1 *T-Mobile USA, Inc.*, 586 F.3d 689, 694 (9th Cir. 2009)(finding allegations "upon information
2 and belief" where no further facts were alleged to be insufficient).

3 **A. Plaintiffs' Claims Improperly are Based on Conclusory Allegations**

4 Plaintiffs' claims are based entirely on two wholly conclusory and unsupported
5 allegations: (1) ATCA negligently "admitted" Lubitz to its flight school when it knew, or
6 should have known, that he had a history of depression and had attempted to conceal that
7 fact from the FAA, and (2) Lubitz suffered a recurrence of his mental health problems while
8 at ATCA that rendered him unfit for flight training, and ATCA negligently failed to stop his
9 training. Complaint, ¶¶ 112-139.

10 No basis exists for these conclusory and "on information and belief" allegations.
11 First, ATCA does not "select," "screen," "admit," or otherwise determine which students
12 attend ATCA. Lubitz attended ATCA because the LFT hired ATCA to teach him to fly a
13 small plane.

14 Second, no evidence exists that ATCA knew, or could have known, about Lubitz'
15 medical history or his communications with the FAA or the LBA. And, as plaintiffs
16 concede, the FAA, and the LBA, were fully aware of Lubitz' medical history and yet still
17 authorized him to attend ATCA. The FAA regulates and controls ATCA's operation of its
18 flight school. Plaintiff's allegations that the FAA and the LBA issued to Lubitz the medical
19 certificates required for him to undergo training at ATCA, with knowledge of his history of
20 depression, are tantamount to judicial admissions that his medical history did not disqualify
21 him from receiving the instruction at ATCA. *See* Complaint, ¶¶ 113-119. Accordingly, even
22 if ATCA knew about Lubitz' past depression, it would have been irrelevant.

23 Similarly, absolutely no evidence exists for the allegation that Lubitz suffered a
24 recurrence of his problems while at ATCA. Plaintiffs do not even bother to offer a factual
25 predicate for this allegation. They simply assert, in a single sentence of their 143 paragraph
26 Complaint, that Lubitz "exhibited ... symptoms" of psychological problems. Complaint, ¶ 7.

27 Plaintiffs' conclusory allegations about Lubitz' mental condition, and ATCA's
28 knowledge of that condition, amount to nothing more than "naked assertions" without

"further factual enhancement," and are insufficient to withstand ATCA's motion to dismiss. *Twombly*, 550 U.S. at 557. Accordingly, the Complaint should be dismissed.

B. ATCA Did Not Owe, or Breach, a Duty to Plaintiffs' Decedents

Plaintiffs allege a negligence cause of action against ATCA. *See* Complaint, ¶ 6. A negligence action requires proof of four elements: (1) a duty, recognized by the law, requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a reasonably close causal connection between the defendant's conduct and the resulting injury; and (4) actual damages. *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (Ariz. 2007).

"Whether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained." *Id.* Whether a duty exists is a matter of law for the court to decide. *Id.* Duty is defined as a legal obligation that requires a defendant "to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985). Foreseeability is not a factor to be considered by courts when making determinations of duty. *Gipson*, 214 Ariz. at 144, 150 P.3d at 231.

A legal duty "may arise from a special relationship based on contract, family relations, or conduct undertaken by the defendant, or may be based on categorical relationships recognized by the common law, such as landowner-invitee." *Delci v. Gutierrez Trucking Co.*, 229 Ariz. 333, 336, 275 P.3d 632, 635 (App. 2012). Recognized "special relationships" include a parent's duty to control a child, a master's duty to control a servant, a landowner's duty to control a licensee, and the duty of caretakers in charge of individuals with dangerous propensities to control those individuals. *Barkhurst v. Kingsmen of Route 66, Inc.*, 234 Ariz. 470, 473, 323 P.3d 753, 756 (App. 2014).

In the absence of a special relationship, "[p]ublic policy may support the recognition of a duty of care." *Gipson*, 214 Ariz. at 145, 150 P.3d at 232. Arizona courts have recognized duties premised on public policy arising from statutes and the common law. *Id.*, 214 Ariz. at 146, 150 P.3d at 233. A statute or regulation typically gives rise to a tort duty

1 premised on public policy only if it "is designed to protect the class of persons, in which
2 plaintiff is included, against the risk of harm which has in fact occurred as a result of its
3 violation." *Estate of Hernandez v. Ariz. Bd. of Regents*, 177 Ariz. 244, 253, 866 P.2d 1330,
4 1339 (1994).

5 No relationship existed between ATCA and Lubitz, or between ATCA and plaintiffs
6 or their decedents, that imposed a duty of care on ATCA. In order for ATCA to "have a duty
7 to control [Lubitz'] conduct, "a special relationship had to exist between them ... such as
8 parent-child, master-servant, possessor of land-licensee, or guardian-ward." *Fedie v.*
9 *Travelodge International, Inc.*, 162 Ariz. 263, 265, 782 P.2d 739, 741 (App. 1989) (citing
10 Restatement (Second) of Torts, §§ 316-319). The only relationship that ever existed between
11 ATCA and Lubitz was that of school and student during the four and one-half months he
12 attended ATCA. That relationship ended when Lubitz returned to Germany, more than four
13 years before the crash. ATCA had no contact with Lubitz, and no authority, ability, or
14 responsibility to control his conduct, at the time of the crash. LRCiv. 56.1 Stmt, ¶ 85.

15 For ATCA "to have been required to protect ... [plaintiff's] decedent[s], a special
16 relationship had to exist between them ... such as carrier-passenger, innkeeper-guest,
17 landlord-invitee, guardian-ward, teacher-student, or jailer-prisoner." *Id.* (citing Restatement,
18 §§ 314A, 320). No such relationship existed. In fact, no relationship at all ever existed
19 between them.

20 Plaintiffs do not even allege the existence of a statute or regulation that imposes a
21 legal duty on ATCA. Accordingly, because ATCA did not owe or breach any duty of care to
22 plaintiffs or their decedents, the Complaint should be dismissed.

23 **C. Plaintiffs Cannot Establish Proximate Cause Against ATCA**

24 The proximate cause of an injury "is that which, in a natural and continuous sequence,
25 unbroken by any efficient intervening cause, produces an injury, and without which the
26 injury would not have occurred." *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539,
27 546, 789 P.2d 1040, 1047 (1990). "An efficient intervening cause is an independent cause
28 that occurs between the original act or omission and the final harm and is necessary in

1 bringing about that harm." *Barrett v Harris*, 207 Ariz. 374, 378, 86 P.3d 954, 958 (App.
2 2004). Intervening causes become superseding causes when the "intervening force was
3 unforeseeable and may be described, with the benefit of hindsight, as extraordinary."
4 *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047. "[A] crime is a superseding cause of harm
5 unless the defendant should have foreseen the crime." *Fedie*, 162 Ariz. at 266, 782 P.2d at
6 742 (citing Restatement § 448). Proximate cause is negated when there is a superseding
7 cause of the alleged harm to the plaintiff. *Id.*

8 As an initial matter, the mass murder committed by Lubitz four years after he left
9 ATCA was, under any reasonable interpretation, an extraordinary and unforeseeable criminal
10 act and thus constituted a superseding cause of the death of plaintiffs' decedents.

11 Nothing that ATCA allegedly did or failed to do proximately caused the deaths of
12 plaintiffs' decedents. As demonstrated above, no evidence exists that ATCA knew about
13 Lubitz' medical history. And, as a practical matter, that history is irrelevant to the claim
14 against ATCA because it did not disqualify Lubitz from participating in pilot training.
15 Moreover, no evidence exists that Lubitz experienced any recurrence of his mental health
16 issues while he was at ATCA, or at any time during the more than five years from October
17 2009 when he completed his treatment, until December 2014, when he began to re-
18 experience his problems.

19 ATCA's act of teaching Lubitz to fly a small plane did not proximately cause him to
20 become, four years later, "a commercial pilot with recurring psychotic, depressive and
21 suicidal disorders." Complaint, ¶ 140. When Lubitz left ATCA, he had not completed his
22 flight training program, did not have a commercial pilot's license, and did not know how to
23 fly a commercial jetliner. In order to get into the cockpit on March 24, 2015, he was
24 required to complete his flight training, learn how to fly commercial jet aircraft, pass six
25 annual aero-medical exams (administered by AME's who knew of his medical history),
26 obtain his commercial pilot's license, obtain employment with Germanwings, and then for
27 five months fly repeatedly with other pilots without raising any suspicion that he was
28 experiencing mental health issues. No reasonable view of these facts can lead to the

1 conclusion that ATCA's basic small plane flying instruction proximately caused Lubitz four
 2 years later to commit suicide and kill plaintiffs' decedents by deliberately flying into a
 3 mountain.

4 Finally, any question of proximate cause is eliminated by the fact that the German
 5 LBA repeatedly renewed Lubitz' medical certification, and issued his commercial pilot's
 6 license – with full knowledge of his history of depression. If his medical certificate had not
 7 been renewed, or his pilot's license denied or revoked, he could not have operated Flight
 8 4U9525. Accordingly, the LBA's decision to issue Lubitz his commercial pilot's license, and
 9 allow him to work as a commercial airline pilot, necessarily negates any possible proximate
 10 cause related to ATCA's alleged conduct. *See McCleaf v. State*, 190 Ariz. 167, 172, 945
 11 P.2d 1298, 1303 (App. 1997)("When a responsible actor assumes control of a situation from
 12 another ... the rule is that the negligence of the initial actor will not be found to be a
 13 proximate cause of the harms that befall after the authoritative and effectual decision is made
 14 as to the same matter has been made by another person empowered to make it."). The LBA
 15 controls the licensing of airline pilots in Germany, and it alone, with full knowledge of
 16 Lubitz' history of depression, made the decision to allow Lubitz to fly commercial airplanes.

17 Accordingly, because plaintiffs cannot establish the requisite element of proximate
 18 cause, their Complaint should be dismissed.

19 **II. ATCA SHOULD BE GRANTED SUMMARY JUDGMENT**

20 The Court has discretion to consider extrinsic materials and convert a 12(b)(6) motion
 21 to dismiss into a motion for summary judgment. Fed. R. Civ. P. 12(d); *Davis v HSBC Bank*,
 22 691 F.3d 1152, 1160 (9th Cir. 2012). In the event the Court determines that dismissal is not
 23 appropriate under Fed. R. Civ. P. 12(b)(6), ATCA requests that it be granted summary
 24 judgment based on the undisputed evidence submitted in support of this motion.

25 Summary judgment is appropriate if the evidence, viewed in the light most favorable
 26 to the nonmoving party, demonstrates "that there is no genuine issue as to any material fact
 27 and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (2).
 28 Only disputes over facts "that might affect the outcome of the suit under the governing law

will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "A fact issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)(quoting *Anderson*, 477 U.S. at 248). The non-movant must come "forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Conclusory allegations, unsupported by factual material, are insufficient to avoid summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Summary judgment is appropriate in this case because, as is established above, absolutely no evidence exists to establish that: (1) ATCA knew about Lubitz' medical history, or (2) that Lubitz experienced any mental health issues while he attended ATCA, or (3) that ATCA was required to deny Lubitz flight training, or (4) that ATCA had or breached any duty to plaintiffs or their decedents, or (5) that anything ATCA allegedly did or failed to do proximately caused the crash of Flight No. 4U9525. Accordingly, because plaintiffs cannot establish their negligence cause of action, the Complaint should be dismissed.

III. THE COMPLAINT SHOULD BE DISMISSED ON THE GROUNDS OF *FORUM NON CONVENIENS*

In the further alternative, this litigation should be dismissed on the grounds of *forum non conveniens* in favor of the courts of Germany, where the overwhelming majority of events surrounding Lubitz' training, licensing, medical treatment, and employment leading up to the crash occurred.

Under the doctrine of *forum non conveniens*, a district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S. Ct. 839, 91 L.Ed. 1055 (1947). "[I]f the balance of convenience suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Lueck v. Sunstrand Corporation*, 236 F.3d 1137, 1145 (9th Cir. 2001).

1 "In dismissing an action on *forum non conveniens* grounds, the court must examine:
2 (1) whether an adequate alternative forum exists, and (2) whether the balance of private and
3 public interest factors favors dismissal." *Lueck*, 236 F.3d at 1142 (*citations omitted*).
4 Although there ordinarily is a strong preference in favor of a U.S. plaintiff's choice of forum,
5 "a foreign plaintiff's choice deserves less deference." *Piper Aircraft Co. v. Reyno*, 454 U.S.
6 235, 256, 102 S. Ct. 252, 70 L.Ed.2d 419 (1981).

7 "An alternative forum is deemed adequate if: (1) the defendant is amenable to process
8 there, and (2) the other jurisdiction offers a satisfactory remedy." *Carijano v. Occidental*
9 *Petroleum Corporation*, 643 F.3d 1216, 1225 (9th Cir. 2013). A defendant's voluntary
10 submission to service of process and consent to jurisdiction in the foreign forum "suffices to
11 meet the first requirement for establishing an adequate alternative forum." *Id.* (*citing Tuazon*
12 *v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006).

13 The foreign forum offers the plaintiff a satisfactory remedy if its "laws provide
14 potential redress for the injury alleged; the fact that the substantive law may be less favorable
15 is relevant only if it would completely deprive plaintiffs of any remedy or would result in
16 unfair treatment." *Tuazon*, 433 F.3d at 1178. "[T]he requirement that the alternative forum
17 provide 'some remedy' for plaintiff's complained of wrong is 'easy to pass; typically, a forum
18 will be inadequate only where the remedy provided is 'so clearly inadequate or
19 unsatisfactory, that it is no remedy at all." *Carijano*, 643 F.3d at 1225 (*citations omitted*).

20 The private interest factors considered by the court are as follows: (1) the residence of
21 the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to
22 physical evidence and other sources of proof; (4) whether unwilling witnesses can be
23 compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the
24 judgment; and (7) all other practical problems that make trial of a case easy, expeditious and
25 inexpensive. *Gulf Oil*, 330 U.S. at 508. The court's focus should not rest on the number of
26 witnesses or the quantity of evidence in each locale. "Rather, a court should evaluate the
27 materiality and importance of the anticipated evidence and witnesses' testimony and then
28 determine their accessibility and convenience to the forum." *Lueck*, at 1146.

Courts consider the following public interest factors: (1) local interest of the lawsuit; (2) the court's familiarity with the governing law; (3) the burden on local courts and juries; (4) congestion in the court; (5) the costs of resolving a dispute unrelated to this forum. *Piper Aircraft*, 454 U.S. at 259-61.

Germany is an adequate alternative forum in which to litigate plaintiffs' claims. ATCA's agreement to submit voluntarily to the jurisdiction of the German courts as a condition of the *forum non conveniens* dismissal establishes that it is amenable to service of process in Germany. *Carijano*, 643 F.3d at 1225. And, the Declaration of Prof. Dr. Staudinger submitted in support of ATCA's motion establishes that German law provides plaintiffs a cause of action against ATCA for the death of their decedents, and recovery of damages, in the event they prove their claims. Accordingly, Germany will provide plaintiffs a satisfactory remedy for their claims against ATCA. *Tuazon*, 433 F.3d at 1178. *See* LRCiv. 56.1 Stmt., ¶¶ 76-79. Courts repeatedly have held that Germany constitutes an adequate alternative forum for purposes of a *forum non conveniens* dismissal. *See, e.g., Carey v. Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234 (2d Cir. 2004); *Wellogix, Inc. v. SAP America, Inc.*, 58 F.Supp.3d 766 (S.D. Tex. 2014).

The private interest factors weigh heavily in favor of litigating this case in Germany. Plaintiffs and their decedents are and were citizens and residents of countries other than the U.S. LRCiv. 56.1 Stmt. ¶ 92. They have no connection to this Court, and their choice of forum is entitled to a lessened deference. Moreover, the overwhelming majority of the events which enabled Lubitz to be at the controls of Flight 4U9525, and allegedly lead to his decision to crash the plane, occurred in Germany. Accordingly, all of the witnesses and evidence related to those events are located in Germany – beyond the jurisdiction of this Court.

Lubitz' history of mental health problems leading up to the crash is a central issue involved in plaintiffs' claims, and all of his medical treatment occurred in Germany – and so all of the physicians who treated him, and all of their records, are located in Germany. Similarly, the employees of LFT who provided the bulk of Lubitz' commercial pilot training

1 (including teaching him how to fly a commercial jet), and who maintained his training
2 records, and who made the decision to graduate him from the LFT course, are located in
3 Germany. The German aero-medical examiners who, six years in a row, examined Lubitz,
4 and with knowledge of his medical history, determined that he was fit to undergo pilot
5 training and to fly commercial passenger aircraft, all are located in Germany. So too are the
6 officials at the LBA who decided to license Lubitz as a commercial pilot, as well as the
7 employees of Germanwings who made the decision to hire Lubitz, who trained him and
8 deemed him fit to fly the A320 aircraft, and the crew members who regularly flew with him
9 in the months leading up to the crash.

10 Plaintiffs allege that ATCA knew that Lubitz was mentally unstable, that it
11 negligently failed to prevent his training, and that its negligence proximately caused and
12 allowed Lubitz – years later – to get hired by Germanwings and get into the cockpit of Flight
13 No. 4U9525. If plaintiffs' claims against ATCA are allowed to go forward, they will involve
14 significant issues of proximate, intervening and superseding cause, and how ATCA's alleged
15 liability is affected by the acts or omissions of the employees of LFT and Germanwings,
16 Lubitz' physicians, the aero-medical examiners, and the German LBA officials, who
17 interacted with Lubitz during the four-plus years between the date he left ATCA, and the
18 date of the crash. All of these witnesses and their records are located in Germany, and this
19 Court does not have the power to compel them to give evidence in this Court. It would be
20 extremely prejudicial to ATCA to be forced to defend against plaintiff's claims in this Court
21 without access to this evidence that is crucial to its defense.

22 The public interest factors also favor *forum non conveniens* dismissal of this action
23 because the vast majority of the events related to the subject crash occurred in Germany, and
24 it would be extremely expensive and time consuming for the parties to have to attempt to
25 engage in what would be the required extensive foreign discovery in Germany concerning
26 the events related to the crash.

27 Because plaintiffs are not citizens or residents of the U.S., the courts of Germany
28 would be no less convenient to them than this Court. And, because ATCA will agreed to

1 make available in Germany, at its expense, all witnesses and evidence that it is required to
 2 produce, plaintiffs would not in any way be prejudiced by having the proceedings take place
 3 in Germany rather than Arizona. *See* Kippenberg Declaration, ¶ 98.

4 Finally, Germanwings, the operator of Flight No. 4U9525, has agreed not to contest
 5 liability for full compensatory damages available under the applicable law in connection with
 6 the death of plaintiffs' decedents. *Id.*, ¶ 91. Germanwings does not conduct any business
 7 operations in the U.S., and so is not subject to jurisdiction in this Court. *Id.*, ¶ 84. However,
 8 it is subject to jurisdiction in Germany. In the event plaintiffs commence litigation against
 9 ATCA in Germany, they presumably would join Germanwings in that litigation, and would
 10 be able to avoid the time and expense involved in establishing liability – leaving only the
 11 issue of their damages to be litigated.

12 CONCLUSION

13 For the foregoing reasons, ATCA's motion to dismiss or, in the alternative, for summary
 14 judgment or, in the further alternative, dismissing plaintiffs' Complaint on the grounds of *forum*
 15 *non conveniens*, should be granted.

16 Dated: New York, New York
 17 June 17, 2016

Respectfully submitted,

18 CLYDE & CO US LLP

19 By: /s/ Christopher Carlsen

20 Christopher Carlsen
 21 Clyde & CO US LLP
 22 405 Lexington Avenue, 16th Floor
 New York, New York 10174
christopher.carlsen@clydeco.us
 Telephone: (212) 710-3900

23 Floyd P. Bienstock
 24 Douglas D. Janicik
 Steptoe & Johnson LLP
 25 201 E. Washington Street, Suite 1600
 Phoenix, Arizona 85004-2382
fbienstock@steptoe.com
djanicik@steptoe.com
 Telephone: (602) 257-5200

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 27
 28 Attorneys for Defendant Airline Training
 Center Arizona, Inc.

NOTICE OF CERTIFICATION OF COUNSEL

I hereby certify that pursuant to this Court's Order dated April 14, 2016, I conferred with counsel for plaintiffs to determine whether an amendment could cure what ATCA maintains is their deficient pleading, and we were unable to agree that the pleading is curable by a permissible amendment.

/s/ Christopher Carlsen

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

KREINDLER & KREINDLER LLP

Francis G. Fleming, Esq.

Brian J. Alexander, Esq.

Marc S. Moller, Esq.

750 Third Avenue

New York, New York 10017

Telephone: (212) 687-8181

Facsimile: (212) 972-9432

Email: ffleming@kreindler.com

balexander@kreindler.com

mmoller@kreindler.com

/s/ Christopher Carlsen